SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 18 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 675

MRS. LILLIAN C. STEVENS, TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF DR. NOAH S. CUTRER, AND NICHOLAS D. OLIVIER,

Petitioners,

versus

HUMBLE OIL & REFINING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REUTER, REUTER & SCHOTT,
ARTHUR C. REUTER,
J. RICHARD REUTER, JR.,
1607 National Bank of Commerce Building,
New Orleans, Louisiana,

HERBERT J. GARON,
1304 National Bank of Commerce Building,
New Orleans, Louisiana,
Attorneys for Mrs. Lillian C. Stevens, Testamentary Executrix of the Succession of Dr. Noah S. Cutrer, and Nicholas D. Olivier.

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	15
CONCLUSION	22
APPENDIX A—OPINIONS BELOW	23
B—LOUISIANA STATUTORY LAW	46

TABLE OF AUTHORITIES.

Cases Cited:

Angelle v. State, 212 La. 1069, 34 So. 2d 321 7

Arkansas Fuel Oil Co. v. State of Louisiana, ex rel Muslow, 304 U. S. 197 .....2, 10, 15, 16, 21

Bernard v. State, 127 So. 2d 774 (La. App.) 7

California Company v. Price, 225 La. 706, 74 So. 2d 1 ..... 9, 17

Cobb v. Louisiana Bd. of Institutions, 229 La. 1, 85 So. 2d 10 9

Cutrer vs. Humble Oil & Refining Company, D. C. 202 F. Supp. 568 3

Cutrer vs. Humble Oil & Refining Company, 309 F. 2d 752 3

Daigle v. Pan American, 236 La. 578, 108 So. 2d 516 .....7, 18, 19

TABLE OF AUTHORITIES—(Continued):

Page

Cases Cited—(Continued):

State, ex rel. Beal v. Caddo Crude Oil Purchasing Co., 189 So. 333, (La. App.) 12

State, ex rel. Boykin v. Hope Producing Co., 167 So. 506, (La. App.) 13

State, ex rel. Muslow v. Louisiana Oil Refining Corp., 176 So. 686, (La. App.) 11, 13

State of Louisiana v. Cenac, 132 So. 2d 897, (La. App.), cert. den., 341 La. 1055, 132 So. 2d 928 ..... 9, 17

Walmsley v. Pan American Petroleum Corp., 244 La. 513, 153 So. 2d 275 .....18, 19

Constitutional Provisions Cited:

State of Louisiana, Constitution of 1921, Article 3, Section 35 7

Statutes Cited:

Act 64 of the Louisiana Legislature of 1934, LSA-R.S. 30:105 .....2, 10, 12, 15, 16

Act 24 of the Louisiana Legislature of 1935, LSA-R.S. 30:108 .....3, 10, 12, 15, 16

Miscellaneous:

23 Louisiana Law Review 574 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. .....

MRS. LILLIAN C. STEVENS, TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF DR. NOAH S. CUTRER, AND NICHOLAS D. OLIVIER,

Petitioners,

versus

HUMBLE OIL & REFINING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mrs. Lillian C. Stevens, the Testamentary Executrix of the Succession of Dr. Noah S. Cutrer, and Nicholas D. Olivier respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on May 27, 1965.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Louisiana (S.R. 36-48) is reported at 228 F. Supp. 787. The opinion of the Court of Appeals for the Fifth Circuit is reported at 346 F. 2nd 43.

JURISDICTION.

The judgment of the Court of Appeals, Fifth Circuit, was made and entered May 27, 1965 (S.R. 56) and a copy thereof is appended to this petition, in the appendix at pages 35-45.

Order permitting filing of rehearing was entered June 18, 1965 (S.R. 69).

Rehearing denied July 21, 1965 (S.R. 88). The jurisdiction of the Court is invoked under 28, U.S.C. Section 1254 (1).

QUESTIONS PRESENTED.

(1) Is it proper to withhold payment of royalties (accumulating since 1958) due to private citizen (lessor) by lessee in possession on grounds that part of the lands are claimed by a third party to be covered by an adverse lease from the State of Louisiana; notwithstanding specific statute requiring payment to lessor who gave lease, as last record owner, and under which lease, lessee has been producing oil and gas without disturbance since 1958 (and continues to do so to this day).

(2) Has the Court of Appeals seriously misconstrued the opinion of The Supreme Court of the United States in *Arkansas Fuel Oil Co. vs. State of Louisiana ex rel Muslow*, 1938, 304 U.S. 197.

STATUTES INVOLVED.

The statute involved here is Act 64 of the Louisiana Legislature of 1934, LSA-RS 30:105, as amended

by Act 24 the Louisiana Legislature of 1935, LSA 30:108, as set forth in the appendix at pages 46-47.

STATEMENT.

This is a suit between plaintiffs-lessors and their lessee, Humble Oil & Refining Company. This action commenced as a suit for the cancellation of an oil, gas and mineral lease.

In the alternative, plaintiffs sought to be paid royalty due and to coerce further development of the leased premises by the lessee.

In proceedings previously had herein the lower court refused to cancel the lease in its entirety, cancelled it as to portions, ordered development of other portions, and (1) as to a portion which it found was in production by defendant, ordered immediate payment to plaintiffs of all past due and future royalties, and (2) as to the balance of the premises which it found in production by defendant, ordered the past due and future royalties placed in escrow.

An appeal was taken from that judgment by all parties.

The United States Court of Appeals, Fifth Circuit affirmed, finding itself in accord with the findings and conclusions of the district court as set forth in its opinion (*Cutrer vs. Humble Oil & Refining Company*, D. C. 202 F. Supp. 568) *Cutrer vs. Humble Oil & Refining Company*, 309 F. 2d 752. Humble Oil and Refining Company sought a writ of certiorari

in the Supreme Court of the United States; certiorari was denied, 373 U.S. 936.

The defendant, Humble Oil & Refining Company, having complied with the judgment of the district court dated March 30, 1962, establishing an escrow account with The National Bank of Commerce in New Orleans, and having deposited therein the funds representing a royalty of 7/64ths of production attributable to 191 acres within portions of the leased premises, being the royalty provided for in the oil, gas and mineral lease dated December 19, 1953 granted by Noah S. Cutrer in favor of Humble Oil & Refining Company, the plaintiffs herein moved the trial court for an order directing The National Bank of Commerce in New Orleans, designated by the court as "escrow agent", to distribute those funds to plaintiffs. That motion was filed April 30, 1963.

On March 30, 1964 the Judge below, the Hon. Frank B. Ellis, denied the plaintiffs the relief they sought and a written opinion was filed April 20, 1964 (228 F. Supp. 787).

An appeal was taken to the United States Court of Appeals, Fifth Circuit. That court affirmed (346 F. 2d 43). (S.R. 56-66.)

Plaintiffs sought to have the deposited past-due royalties, which have been accumulating since 1958, paid to them in accordance with the terms of the lease granted by Dr. Noah S. Cutrer to Humble Oil & Refining Company in December of 1953 and the judgment of the district court of March 30, 1962.

It has consistently been the position of Humble Oil & Refining Company throughout this litigation that it was entitled to withhold payment of these deposited royalties to plaintiffs because of "adverse claims". The Honorable J. Skelly Wright the United States District Judge who rendered the opinion and judgment in this matter, stated in his opinion, in referring to the evidence, the arguments and the law claimed by defendant to be applicable here:

> "All this, however, does not necessarily mean that an adverse 'claim' exists within the meaning of the lease provision. On the contrary, as indicated in a prior opinion, that term must probably be understood restrictively as including *only a claim judicially asserted*. . . ."
>
> ". . . and because the state proceedings presently pending between plaintiffs and Gulf may *soon* resolve the basic title question, defendant should not *now* be required to pay over to the plaintiffs royalties attributable to the submerged acreage. . ." (Emphasis supplied.)

The Court then in its opinion ordered that the royalties should be paid in escrow at least quarterly until such time as the plaintiffs' title is quieted or defeated, *or until the further orders of the court.* After referring to a trespass action brought by the plaintiffs in the state court against Gulf Oil Corporation, with whom the defendant herein, Humble Oil & Refining Company, has certain agreements, the Court in its opinion retained

> ". . . jurisdiction of the case for reconsideration should anything prevent a prompt adjudi-

cation of the title question by the state tribunals."

The Plaintiffs Have Been And Are Prevented From Having A Prompt Adjudication Of The "Title Question" By The State Tribunals.

The plaintiffs sought to enjoin Gulf Oil Corporation from trespassing on the leased premises after being notified by Humble of an alleged trespass. Gulf Oil Corporation has defended the trespass suit by justifying its presence on the leased premises under authority from Humble as lessee of the plaintiffs. From the agreements which have come to light, it is obvious that Humble Oil & Refining Company and Gulf Oil Corporation have the common goal of frustrating the plaintiffs' efforts to secure their royalties, including those sought in this rule.

In the trespass action Gulf has failed to call its lessor, the so-called adverse claimant, the State of Louisiana, in warranty to defend; nor has it in any other manner sought to make the State a party to that litigation. This failure of Gulf, as a result of the coordinated movements of Gulf and Humble, to follow the usual and customary procedure of the lessee calling its lessor in warranty when the former's possession is questioned, constitutes an active prevention of the prompt adjudication of the title question by the state tribunals. As the state court trespass suit presently stands, title cannot be adjudicated therein. It is further to be noted that Humble Oil & Refining Company intervened in

these state court proceeding in October of 1959, and has undertaken no action in that suit from then until now which would bring about an adjudication of the "title question".

It is fundamental that under the Louisiana Constitution and decisions, the plaintiffs are forbidden from suing the State of Louisiana in order to adjudicate the title question because of the sovereign immunity; *Art. 3, Section 35, Louisiana Constitution of 1921; Daigle vs. Pan American,* 236 La. 578, 108 So. 2d 516; *Angelle vs. State,* 34 So. 2d 321; *Bernard vs. State,* 127 So. 2d 774.

As stated by Justice McCaleb in the case of *Angelle vs. State,* 34 So. 2d 321:

> "The principle that the sovereign cannot be sued in its own courts without the consent of the Legislature is so fundamental that citation of authority would be superfluous. Suffice it to say that it is the universal rule given full recognition in our Constitution."

The plaintiffs thus cannot have any reasonable expectancy of raising the title question by any action of their *own.*

That the State of Louisiana does not propose to adjudicate the "title question" and thus afford plaintiffs an opportunity to defeat any claim which might be made by the State is evident from the testimony of Jack P. F. Gremillion, Attorney General of the State of Louisiana, who testified in this case on June 7, 1961 in his official capacity as At-

torney General of the State of Louisiana. He testified that he was aware not later than the date of the filing of this suit (March 9, 1959) that Dr. Noah S. Cutrer and Nicholas D. Olivier claimed to own the area in question:

"Q. How long have you been conscious of the fact that Mr. Cutrer and Mr. Olivier claimed they owned this property?

"A. When the suit was filed.

"Q. In March of '58?

"A. I don't know the date.

"Q. Whenever it was filed, you were aware of it then?

"A. Yes, definitely. As a matter of fact, if I'm not mistaken, I believe you were the one that subpoenaed me.

"Q. That is right. Has the state filed any suit against Dr. Cutrer or Mr. Olivier?

"A. We have no occasion to because we've had uninterrupted possession since 1929. We have been paid our royalties, and we have been paid for rental. We have been perfectly satisfied. There was absolutely no reason for us to file a suit against these people because all the obligations of Lease 195 were being complied with by the lessee.

"Q. Did your lessee ever tell you anyone had challenged that Lease 195, as you call it?

"A. No one has ever told me about a challenge to Lease 195. In fact, I don't think Lease 195 is being challenged here."

Over six years have elapsed since the State of Louisiana has had notice of the plaintiffs' ownership, and the State of Louisiana has not undertaken any legal actions to determine its situation as against the plaintiffs. Under the now well-settled principles of law enunciated in *California Company vs. Price*, 74 So. 2d 1, 225 La. 706, as re-affirmed by the Supreme Court of Louisiana in *State of Louisiana vs. Cenac*, (132 So. 2d 897, certiorari denied November 17, 1961, 341 La. 1055, 132 So. 2d 928) the reluctance of the State to assert any claim of title is easily understood.

In its opinion, the Court below stated:

> "Plaintiffs further contend that the State of Louisiana is immune from a suit of this nature. The court agrees, *Cobb vs. Louisiana Board of Institutions*, 229 La. 1, 85 So.2d 10. . ."

The Supreme Court of Louisiana in the *Cobb* case, with Justice McCaleb as the organ of the Court, specifically pointed out that the law of Louisiana is:

> ". . .No suit shall be entertained unless authorized by the Legislature."

Accordingly, it is submitted that a prompt adjudication of the "title question" by the state tribunals has been prevented.

The Court Should Now Order The Deposited Funds Paid To Plaintiffs.

That the Court was troubled by the remote possibility that Humble Oil & Refining Company would

be required to pay royalty to the State, in addition to the royalties paid to plaintiffs, is evident from the following portion of its opinion:

> "Nevertheless, because there is no protection for a mineral lessee who pays royalties erroneously on minerals produced from state lands,[24] . . ."
>
> [24] The protection afforded mineral lessees on private lands when they pay royalties to the record owner, absent a judicially asserted adverse claim, La. R.S. 30:105, 30:106, is expressly withheld in the case of state lands. La. R. S. 30:108.

Humble Oil & Refining Company Is Adequately Protected From Any Claim By The State To The Deposited Funds.

In a closely paralleled fact situation, the United States Supreme Court held that Act 64 of 1934, as amended, afforded full protection against any claim for dual payment in the case of *Arkansas Fuel Oil Co. vs. Louisiana ex rel Muslow*, 304 U.S. 197, 82 L. Ed. 1287, 58 S. Ct. 833. That suit was filed on May 20, 1935 in the First Judicial District Court, Caddo Parish, Louisiana, under the provisions of Act 64 of 1934 (La. R. S. 30:105, et seq.), seeking the payment of royalties due plaintiffs by defendant. Defendant, *among other defenses, pleaded that Act 24 of the first Extra Session of 1935 (now La. R. S. 30:108)* rendered inapplicable the provisions of Act 64 of 1934 (now La. R. S. 30:105-107) because the State of Louisiana claimed title to the property. In other words, the defendant there pleaded that the protection afforded mineral lessees on private

lands when they pay royalties to the record owner was expressly withheld in the case of state lands.

The district court held that Act applicable, and ordered payment in full of *all* royalties due under the lease to plaintiff.

On appeal to the Louisiana Court of Appeal, Second Circuit, the judgment of the lower court was upheld. *State vs. Louisiana Oil Refining Corp.*, 176 So. 686.

After a petition for a writ of certiorari and review was denied by the Supreme Court of Louisiana, the Supreme Court of the United States heard the case.

Mr. Justice Black, in delivering the opinion of the Court, from which none of the Justices dissented, answered the defense that because the property could be claimed by the State of Louisiana the Act was inapplicable, which defense had been specifically pleaded, by saying:

> "The only suggestion appellant has made as to any owner not of 'record' was that the property belonged to the State of Louisiana. That State—alleged by appellant to be the true owner of the land from which the oil was obtained —passed the 1934 Act and its courts have held that payment to Muslow will relieve appellant of the indebtedness. Appellant seeks to escape payment to Muslow for the oil, which it purchased in 1934 on the ground that such payment would not discharge the indebtedness to a 'true

owner'—alleged to be the State of Louisiana. The Louisiana Court of Appeal speaking in this case has declared that the statute 'protects the purchaser in paying the price to the one from whom the oil has been purchased; and, *under the express declarations of the Act,* no recourse may thereafter be had by any third person or adverse claimant against such buyer.'" (Emphasis supplied.)

The Supreme Court of the United States quoted with approval the Court of Appeal of Louisiana, as follows:

"We experience little difficulty in determining the legislative intent in adopting this Act. It supplied a long-felt need, and in its operative effect will serve to prevent imposition upon and unjust discrimination against those whom it was intended to protect. The Act establishes a rule of conduct for the protection of lessors, their assignees under oil and gas leases, and also a rule of security and safety for lessees and those holding under or purchasing from them. . . The Act was designed also to protect those persons whose rights arose from or are based upon contracts with the last record owner of the land covered thereby, and to those who deal with or acquire from such persons."

The Court in the case of *State ex rel Beal vs. Caddo Crude Oil Purchasing Co.,* 189 So. 333, in applying the rationale of the prior decision in connection with Act 64 of 1934, as amended (La. R. S. 30:105-108) including the United States Supreme Court decision in the *Muslow* case, clearly answered and

put at rest the problems of protection for a mineral lessee who pays royalties to the last record owner, and said:

> "Respondent as stakeholder should be concerned only with protecting itself against the danger of being exposed to double liability for the price of the oil. When made secure against such a contingency, its anxiety should be allayed. Payments to relators under a decree of court will shield it completely against the evil day of double payments. *State ex rel Muslow vs. Louisiana Oil Refining Corporation,* La. App. 176 So. 686; *State ex rel Boykins vs. Hope Producing Company,* La. App., 167 So. 506."

It is submitted that plaintiffs here are part of the class of persons in whose favor the Act was passed in order to prevent "imposition upon and unjust dis-discrimination against. . ."

Of equal importance is the holding of the Muslow and subsequent cases to the effect that a lessee situated as Humble finds itself is one for whom the Act provided "a rule of security and safety for lessees and those holding under or purchasing from them."

As To The Deposited Funds, The State Of Louisiana:

1. **Has Not Made Any Claim,**
2. **Has Through Its Attorney General Declared That There Is No Reason For It To Make Any Claim,**
3. **Has Already Been Paid All Royalties And Rentals Due To It.**

In his testimony on the trial of the instant case, the Attorney General of the State of Louisiana testified unequivocally that he was very familiar with this matter at least since March 9, 1959; that the State had not filed a suit because:

> "We have been paid our royalties, and we have been paid for rental. We have been perfectly satisfied. There was absolutely no reason for us to file a suit against these people because all the obligations of Lease 195 were being complied with by the lessee."

There is nothing to indicate any change in the situation since the testimony of the Attorney General was given.

The law, equity and the facts of this case all require the payment now of the deposited funds to plaintiffs.

1. There has not been a prompt adjudication of the "title question" by the state tribunals.

2. Plaintiffs cannot cause a prompt adjudication of the "title question".

3. The combination of Gulf-Humble has prevented a prompt adjudication in the state court of the "title question".

4. The State of Louisiana chooses not to adjudicate the "title question".

5. Humble Oil & Refining Company is fully protected under the applicable statutes and decisions from any claim by the State of Louisiana on the funds deposited.

REASONS FOR GRANTING WRIT.

I. Plaintiffs have been denied, in direct violation of their rights under the Statute (Act 64 of the Louisiana Legislature as amended by Act 24 of the Louisiana Legislature of 1935 LSA:RS 30:105-108) payment of royalties due to them, because of the failure of the Court to apply the Statute.

II. Plaintiffs have been denied, in direct violation of their rights under the Statute above mentioned and in violation of their rights as set forth by the Supreme Court of the United States in *Arkansas Fuel Oil Co. vs. Louisiana ex rel Muslow*, 304 U.S. 197 payment because of the failure of the Court of Appeals, Fifth Circuit to apply the Law as set forth by the Supreme Court of the United States.

III. The Court of Appeals for the Fifth Circuit has failed to apply the law of Louisiana as determined by the Courts of that State.

I.

The Court of Appeals, Fifth Circuit, erred in concluding that Humble would not be adequately protected against double payment of royalty should the Court order distribution of the escrow fund. It must be emphasized that Humble has only one landlord

or lessor. It could not be liable to anyone else for the royalty. In Louisiana royalty is rent, and the only possible claim to royalty is by a landlord. Whatever may be the rights or claims of others, it is not to the funds in escrow that they must look.

Act 64 of 1934 (La. RS 30:105, etc., as amended by Act 24 of the First Extra Session of 1935, now La. RS 30:108), does fully protect Humble from the risk of dual payment. The evil practice of withholding payment of royalty to the beleaguered royalty owner is sought to be abated by the legislature with the enactment of the statute. It is interesting to note in an article in 23 Louisiana Law Review at page 574 the optimistic statement of the author to the effect that the statute virtually eliminates the withholding provision as an instrument of third-party harassment. It was certainly thus intended, and it is submitted that this Court should seek to carry out the policy of the legislature of Louisiana aimed at protecting the last record owner and insuring reasonably prompt payment to him of royalty due by his lessee.

II.

It is respectfully submitted that a careful reading of the opinion in the case of *Arkansas Fuel Oil Co. vs. Louisiana, ex rel Muslow,* 304 U.S. 197, 82 L. Ed. 1287, 58 S. Ct. 833, will reveal that the opinion extended protection to those situated as the plaintiffs are in this case. It is to be noted also that the defendant in that case *specifically* pleaded the amendment of 1935. The Court of Appeals, Fifth

Circuit, erroneously concluded that, "The effect of this amendment was also not considered by the Court in Muslow."

It is submitted that a reading of the pleadings in the *Muslow* case clearly reflects that the question of the 1935 amendment was squarely put at issue. The Court of Appeals, Fifth Circuit erroneously distinguished the *Muslow* case by saying it was not found that the State had title and therefore the lands did not belong to the State. Petitioners here urge upon the Court that, in the case at bar, there is certainly no evidence that the State owns the land or that the land from which the minerals are being produced belong to the State; quite the contrary, the only evidence before the Court now consists of patents from the State of Louisiana to lessors' authors in title, and under the now well-settled principles of law enunciated in *California Company vs. Price,* 74 So. 2d 1, 225 La. 706 as re-affirmed by the *Supreme Court of Louisiana* in *State of Louisiana vs. Cenac,* 132 So. 2d 897, certiorari denied, November 17, 1961, 341 La. 1055, 132 So. 2d 928, the State is not permitted to assail its own patents, and its reluctance to do so is certainly well understood.

III.

That Court erred in disagreeing "with the plaintiffs' basic assumption that title can be settled against the State only", and the holding of this Court that the Louisiana Supreme Court has made it clear that there can be an adjudication of title, incidental to cancellation of a state mineral lease whether or not the State is joined is not supported

by the State jurisprudence. In *Walmsley vs. Pan American Petroleum Corp.*, 244 La. 513, 153 So. 2d 275, which the Court cites as authority for leaving no doubt that Louisiana decisions declare that the issue of title may be determined as incidental to plaintiffs' right to have an alleged cloud removed from the title, the Supreme Court of Louisiana said:

> "This prayer does not ultimately put the title of anyone at issue."

As a matter of fact, all that the Supreme Court of Louisiana held in that case was that the plaintiff had not alleged a petitory action to which the State was an indispensable party. The Supreme Court was very careful to point out in its opinion that:

> "This prayer does not ultimately put the title of anyone at issue."

and

> "There will be no adjudication of ownership as between plaintiffs and defendants, which would be the case if this were a petitory action."

It is submitted that a careful reading of the opinion of the *Walmsley* case and a consideration of the holding of that case as opposed to the dicta contained in the opinion clearly illustrates that the present law of the State of Louisiana is that title cannot be adjudicated as against the State unless the State is a party. We are unable to understand fully the Court of Appeals, Fifth Circuit citing the case of *Daigle vs. Pan American Petroleum Co.*, 236 La. 578, 108 So. 2d 518, as authority for the

proposition that title against the State may be determined without its presence. The clear and unequivocal holding of the Supreme Court of Louisiana in the *Daigle* case was that as a predicate to bringing the action to establish title to real estate, authorization of the state to be sued was required to be obtained. The Supreme Court in the *Daigle* case held that the State Mineral Board is merely the agent to supervise and handle certain features of the State's affairs which deal with the development and supervision of its lands for mineral purposes. The Court correctly pointed out that in that respect the State did not and has not transferred to the State Mineral Board title to its lands and mineral rights. The Supreme Court in the *Daigle* case specifically held that the action to quiet title brought by the plaintiff had become moot. The Court went on to say that the action to establish title to real estate could not be brought without the authorization of the State permitting itself to be sued.

Incidentally, we believe that a careful reading of the *Daigle* opinion forcefully illustrates the frustrations to be faced by the plaintiffs here in the event they would pursue the course suggested by the Court and attempt by indirection, that is by bringing a suit to remove a cloud from their title, to accomplish what the law of Louisiana clearly states they are unable to do, that is, have an adjudication of their title against the State without the presence and consent of the State. Both *Walmsley* and *Daigle* are good authority for the proposition that the plaintiffs here cannot get an adjudication of their title without the consent of the State.

We believe that the Court of Appeals, Fifth Circuit, erred in making distinctions between settlement of title, action to quiet title, determination of title, adjudication of title, and declaration of title. The initial opinion of the district court concerning the escrow fund (202 F. Supp. at 574) specifically provided (as set forth on page 6 of this Court's opinion in the case at bar) that:

> "The Court will retain jurisdiction of the case should anything prevent a prompt adjudication of the title question by the state tribunals."

We believe it is not subject to serious dispute that adjudication of title means a final judicial determination of the title. This cannot be accomplished without the consent of the State.

This Court below fell into error in finding that the plaintiffs (lessors) have the burden of quieting their title. We believe that at this stage of these proceedings it is not necessary to cite legal authority for the proposition that the burden of a lessor in Louisiana is to keep his tenant in peaceful possession. The district court and the Court of Appeals, Fifth Circuit, previously have found that Humble's possession is peaceful, and that Gulf's presence is not adverse. The only authority for Humble's presence at all is plaintiffs' lease. Humble has been in continuous, peaceful, uninterrupted, actual, physical, corporeal possession of all of the property involved in this appeal as the lessee of Cutrer since 1948; Humble has been taking plaintiffs' oil and gas daily from the property involved in this appeal since 1958, and continues to this moment to do so

undisturbed—but has paid the plaintiffs nothing and has paid no one else anything for that oil and gas. Humble, of course, has never disputed or questioned its lessors' title.

It is respectfully submitted, therefore, that Humble actually has no risk of dual payment in the premises; any such risks which may have existed in the past have been eliminated by the enactment of Act 64 of 1934, and the validity of that statute has been upheld in *Arkansas vs. Muslow*. Humble has no lease with the State of anyone else, and it is difficult to explain to these plaintiffs how Humble can under the law be entitled to take unto itself and keep seven-eighths of the minerals produced from the plaintiffs' lands and have the other eighth, representing the rent or royalty due to the plaintiffs from whose lands the minerals are being produced, placed in escrow and beyond their reach for such an unreasonable length of time as has elapsed here.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

REUTER, REUTER & SCHOTT,
ARTHUR C. REUTER,
J. RICHARD REUTER, JR.,
1607 National Bank of Commerce Building,
New Orleans, Louisiana,

HERBERT J. GARON,
1304 National Bank of Commerce Building,
New Orleans, Louisiana,
Attorneys for Mrs. Lillian C. Stevens, Testamentary Executrix of the Succession of Dr. Noah S. Cutrer, and Nicholas D. Olivier.

CERTIFICATE.

I certify that I have served a copy of the foregoing brief upon opposing counsel on ....., 1965.

APPENDIX A.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

NEW ORLEANS DIVISION.

CA 8842-B.

NOAH S. CUTRER AND NICHOLAS D. OLIVIER,

versus

HUMBLE OIL & REFINING COMPANY.

Arthur C. Reuter, Attorney for Plaintiffs.

Charles Janvier, Bernard J. Caillouet, W. K. McAnelly, Jr., Attorneys for Humble Oil & Refining Company.

Andrew McCollam, Jr., H. H. Hillyer, Jr., L. K. Benson, Attorneys for Humble Oil & Refining Company.

Murphy Moss, Attorney for The National Bank of Commerce.

ELLIS, FRANK B.—JUDGE.

This is phase three involving an oil and gas lease from the plaintiffs to Humble Oil & Refining Company covering a substantial acreage in and around Stone Island and a portion of the West Black Bay Field in Plaquemines Parish, Louisiana.[1] The acre-

[1] See *Cutrer v. Humble Oil & Refining Company*, ED La. 192 F.Supp. 757, and *Cutrer v. Humble Oil & Refining Company*, ED La. 202 F. Supp. 568, affirmed, 309 F. 2d 752, cert. den. 372 U. S. 936; hereafter referred to as *Cutrer I* and *Cutrer II* respectively.

age involved embraces some 1920 acres of which all but about one hundred acres are submerged. This is the source of the difficulty,[2] for the State of Louisiana has previously issued a conflicting lease, State Lease # 195, originally dated February 28, 1928, bearing the designation "QQ". This State lease is presently owned in equal shares by the Gulf Oil Corporation, as operator, and the Estate of William Helis, and covers all state lands and water bottoms in a large tract which includes the areas here involved.[3]

Plaintiffs' 5-year lease was executed in December of 1953; however there is a serious question con-

[2] "It has been the public policy of the State of Louisiana at all times since its admission into the Union that all navigable waters and the beds of same within its boundaries are common or public things and insusceptible of private ownership; that no act of the Legislature of Louisiana has been enacted in contravention of said policy, and that the intent of the Legislature of this State at the time of the enactment of . . . RS 9:5661, and continuously thereafter was and is at this present time to ratify and confirm only those patents which conveyed or purported to convey public lands susceptible of private ownership of the nature and character, the alienation or transfer of which was authorized by law but not patents or transfers which purported to convey or transfer navigable waters and the beds of same." Louisiana Revised Statutes, Title 9, Section 1107 (Act 727 of 1954, Section 1.)

"Any patent or transfer heretofore or hereafter issued or made is null and void, so far as same purports to include such navigable waters and the beds thereof, as having been issued or made in contravention of the public policy of this state and without any prior authorization by law; . . ." Louisiana Revised Statutes, Title 9, Section 1108 (Act 757 of 1954, Section 2).

"No Statute enacted by the Legislature of Louisiana shall be construed as to validate by reason of prescription or peremption any patent or transfer issued by the state or any levee district thereof, so far as the same purports to include navigable or tide waters or the beds of same." Louisiana Revised Statutes, Title 9, Section 1109. (Act 727 of 1954, Section 3).

[3] The acreage involved is the NW¼, SW¼ and SE¼ of Section 18; the NE¼ and SW¼ of Section 19; the NW¼, SW¼ and SE¼ of Section 20; and all of Section 31; all located in Township 17 South, Range 17 East. Section 31 is not included in State Lease 195.

cerning the plaintiffs' title to the minerals in the water bottoms, which would normally belong to the state.[4] Humble was understandably reluctant to explore the water bottoms within the lease until the matter was settled; did no drilling and to keep the lease in force paid delay rentals.

Prior to the lease in suit Gulf, as a co-lessee from the State, had already drilled producing wells on the premises it leased from the State, which includes the entire tract here involved, with the exception of Section 31.

Late in 1958, with the lease about to expire, Humble entered into a joint operating agreement with the State's lessees for the development of Stone Island and the immediately surrounding water botoms, unitized under orders of the Louisiana Department of Conservation. This suit for cancellation was filed on March 9, 1959.

In *Cutrer I*, the matter was before the Court on plaintiffs' motion for cancellation of the lease for non-payment of royalties. The motion to cancel was denied grounded on the fact that Humble's position was, at worst, erroneous.

In *Cutrer II*, the Court was persuaded that defendant should not be compelled to assume the risk of making royalty payments until plaintiffs' title to the submerged portions of the lease was confirmed or in some way settled, and concluded, stating:

> "Accordingly, as soon as an escrow plan can be established, Humble will deliver all accrued

[4] See Footnote 2, supra.

royalties attributable to the joint area water bottoms within the lease, and will henceforth pay into that fund all such royalties, at least quarterly, until such time as the plaintiffs' title is quieted or defeated, or until the further orders of the Court. The court will retain jurisdiction of the case for reconsideration should anything prevent a prompt adjudication of the title question by the state tribunals." *Cutrer II*, supra, at page 574.

The motivating force behind this procedure as established by the Court as then constituted, was concern over the basic principal that "there is no protection for a mineral lessee who pays royalties erroneously on minerals produced from state lands, and because the state proceedings presently pending between plaintiffs and Gulf may soon resolve the basic title question." *Cutrer II*, supra at Page 574. The applicable statutory provisions of the law of Louisiana are:

"It shall be unlawful for a person acquiring mineral rights from, or mineral rights under a lease by, the last record owner and holding under an instrument sufficient in terms to transfer title or for a person purchasing mineral products to withhold payment of any rentals, royalties or other sums due to a party holding an interest in the minerals, or under the lease." Louisiana Revised Statutes, Title 30, Section 105. (Act 64 of 1934, Section 1.)

"A. A person producing minerals under a lease granted by the last record owner and holding

under an instrument sufficient in terms to transfer title to the land or mineral rights, shall be presumed to have derived his right from the true owner. The lessor, royalty owner, lessee or producer or persons holding from them shall be entitled to all minerals produced or to their proceeds, unless and until a suit testing title of the land or mineral rights embraced in the lease is filed in the district court of the parish in which the property is located.

"B. A purchaser of minerals produced from a recorded lease granted under these conditions shall be fully protected in making payment to any party in interest under the lease unless and until the above mentioned suit should be filed and the purchaser receives notification of it by the usual postal registry receipt card. The purchaser shall not be entitled to this protection unless he has recorded in the conveyance records of the parish in which the land is located, notice that the minerals have been and will be bought by him." Louisiana Revised Statutes, Title 30, Section 106. (Act 64 of 1934, Section 2.)

"R.S. 30:105-106 shall not apply to minerals produced from lands belonging to the state." Louisiana Revised Statutes, Title 30, Section 108. (Act 64 of 1934, Section 6; Act 24 of the Extra Session 1935, Section 2.)

The opinion in *Cutrer II* was dated February 20, 1962, and the reference to "proceedings presently pending between plaintiff and Gulf" was reference to *Noah S. Cutrer and Nicholas D. Olivier v. Gulf Oil*

Corporation, Civil District Court for the Parish of Orleans, Louisiana, Number 366-650, filed November 13, 1958. To round out the historical facts it should be mentioned that a third suit was filed.[5]

Cutrer II was appealed and affirmed on November 28, 1962, in a Per Curiam opinion stating: "Finding ourselves in accord with the findings and conclusions of the district court, as set forth in its opinion, we affirm its judgment for reasons which it has assigned. Affirmed." *Humble Oil & Refining Company v. Noah S. Cutrer and Nicholas D. Olivier*, 5 Cir. 309 F. 2d, 752. On March 4, 1963, the Supreme Court denied certiorari, *Humble Oil & Refining Company v. Cutrer, et al.*, 372 U. S. 936.[6]

Thereafter, on March 15, 1963, plaintiffs filed a motion to hold defendant in contempt for failure to make payment to the National Bank of Commerce in New Orleans, the designated Escrow Agent, the sums represented by a royalty of 7/64th of production.[7]

---

[5] *Noah S. Cutrer, et al v. Manning Oil Corporation*, 25th Judicial District Court for the Parish of Plaquemines, Louisiana, Nos. 4737 and 4738, filed July 16, 1958. This was a litigious matter wherein the present plaintiffs sought to quiet their title as against a group of persons and corporations, referred to as the Perez Group, who claimed all of the acreage here involved under tax sales and had granted a mineral lease to Helis. A consent judgment was obtained recognizing their (plaintiffs') ownership in return for conceding their opponents (the Perez Group) certain small mineral royalties.

[6] During the interim one of the plaintiffs, Dr. Noah S. Cutrer, died and his estate was opened under docket Number 16,150, 19th Judicial District Court, Parish of East Baton Rouge, Louisiana. The Court, *In the Matter of The Succession of Dr. Noah S. Cutrer*, appointed and confirmed Mrs. Lillian C. Stevens as testamentary executrix. She was substituted as a party plaintiff herein on March 13, 1963.

[7] This motion was predicated upon a judgment signed on March 30, 1962, by this court, as then constituted, wherein Judge Wright, in paragraph D thereof, stated: "Upon this judgment becoming *final and executory*, defendant shall . . . make payment to the hereafter designated 'Escrow Agent' of the sums represented by

This brings us to *Cutrer III* which is plaintiffs' motion to have escrow agent pay out funds deposited to plaintiffs.[8] While there is no authority in the Federal Rules for such a motion the court will disregard this procedural irregularity and treat the motion as one for summary judgment.[9]

Plaintiffs state that they are entitled to a release of the monies held in escrow because they have been *prevented from having a prompt adjudication* of the "title question" by the state tribunals.[10] Plaintiffs

---

a royalty . . . of 7/64th of production attributable to the water bottoms. . . . within that portion of the 'joint area', etc.," and upon the mistaken belief that the denial of certiorari by the Supreme Court was *"final and executory"* within the purview of the judgment of March 30, 1962.

Supreme Court General Rule 58, wherein it is provided in Paragraph 2 that "[a] petition for rehearing of orders on petitions for writs of certiorari may be filed with the Clerk in term time or vacation, subject to the requirements respecting time, . . . as provided in Paragraph 1 of this rule[,]" and Paragraph 1 which provides, in respect to time that "[a] petition for rehearing . . . may be filed with the clerk in term time or in vacation, within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof."

The judgment of March 30, 1962, did not become *final and executory* until March 29, 1963. the expiration date of the twenty-five day mandate in General Rule 58 (1). Plaintiffs' motion for contempt was denied on March 20, 1963.

[8] At present there is about $335,277.87 on deposit with The National Bank of Commerce in New Orleans, Escrow Agent.

[9] Federal Rules of Civil Procedure Rule 56, 28 U.S.C.A. Whether or not the matter is one which should have been more properly handled by way of supplemental complaint (Federal Rules of Civil Procedure Rule 15 (d)) followed by a motion for summary judgment is an open question which the Court shall also ignore in lieu of the above.

[10] The concluding sentence of *Cutrer II* states that "[t]he court will retain jurisdiction of the case for reconsideration should anything prevent a prompt adjudication of the title question by the state tribunals."

This sentence was footnoted as follows: "It may be that the fundamental title question cannot be resolved in that proceeding [*Noah S. Cutrer and Nicholas D. Olivier v. Gulf Oil Corporation*, supra] against one of the state's lessees. Though the lessor, the

argue that in the trespass action Gulf has failed to call its lessor, the so-called adverse claimant, the State of Louisiana, in warranty to defend; nor has it, Gulf, in any other manner sought to make the State a party to that litigation. This, plaintiffs' claim, constitutes an active prevention of the prompt adjudication of the title question by the state tribunals.

This position is untenable. First of all, while there may be some obligation on Gulf to call its lessor in warranty[11] it is not incumbent upon this court to pick the brains of the Gulf Oil Corporation as to why they have not called the State of Louisiana or its Mineral Board in warranty to defend. (The amenability of the State of Louisiana to a suit of this nature will be discussed in subsequent paragraphs.)

Secondly, the Court would like to point out that while the action now pending in the State Court is one of ejectment (referred to as one of trespass) plaintiffs may amend that petition;[12] they may file

---

State Mineral Board is amenable to suit, LSA-RS: 30:121; *Texas Company v. State Mineral Board*, 216 La. 742, 44 So. 2d 841, the state itself, presumably immune in the absence of consent, is perhaps an indispensable party in the title dispute. See *Daigle v. Pan American Production Company*, 236 La. 578, 108 So. 2d 516."

[11] "If the persons by whom those acts of disturbance have been committed, pretend to have a right to the thing leased, or if the lessee is cited to appear before a court of justice to answer to the complaint of the person thus claiming some servitude on the same, he shall call the lessor in warranty, and shall be dismissed from the suit if he wishes it, by naming the person under whose rights he possesses." Louisiana Civil Code, Article 2704.

[12] "A plaintiff may amend his petition without leave of court at any time before the answer thereto is served . . . Otherwise, the petition and answer may be amended only by leave of court or by written consent of the adverse party." Louisiana Code of Practice, Article 1151.

a supplementary petition[18] so as to style it an action to quiet title or one to remove a cloud therefrom.

Even if the motions to amend or supplement the original petition are denied, plaintiffs are still not foreclosed from adjudicating the title question in the state courts for they may institute an entirely new state action against both Gulf and the State Mineral Board.

Nor can it be any longer seriously questioned that the State Mineral Board is immune from suit in an action to quiet title or to remove a cloud therefrom, *Walsmley v. Pan American Petroleum Corporation*, 244 La. 510, 153 So. 2d 375.

It would also appear from the Louisiana jurisprudence in point that the action to quiet title is synonymous with the action to remove a cloud therefrom. "It is neither petitory nor possessory, nor is it one in jactitation nor one to try title under Act 38 of 1908 (LSA RS 13:5062). Having no codal or statutory background, it is an innovation of our jurisprudence. In any action to remove a cloud . . . possession is not necessary in either plaintiff or defendant. A plaintiff may sue for the cancellation of a recorded deed, mineral lease or other recorded instrument which allegedly operates as a cloud on his title, and *the issue of title may be determined as in-*

[18] The court, on motion of a party, upon reasonable notice and upon such terms as are just, may permit mover to file a supplemental petition or answer setting forth items of damage, causes of action or defenses which have become exigible since the date of filing the original petition or answer, and which are related to or connected with the causes of action or defenses asserted therein." Louisiana Code of Practice, Article 1155.

cidental to plaintiff's right to have the alleged cloud removed. In such an instance the relief sought is not that the defendant be ordered to disclaim title or make good the asserted title—the peculiar characteristic of an action in jactitation—but the cancellation and erasure from the public records of a recorded instrument operating as a cloud on plaintiff's title." *Daigle v. Pan American Production Company,* 236 La. 578, 108 So.2d 516. (Italics supplied.)

Plaintiffs further contend that the State of Louisiana is immune from a suit of this nature. The Court agrees, *Cobb v. Louisiana Board of Institutions,* 229 La. 1, 85 So. 2d 10; however the question of whether or not the State of Louisiana can be sued without its consent in matters arising out of the leasing of its lands for exploration for minerals is, historically, an interesting one,[14] but there is no need to delve

[14] Earlier cases dealing with the problem disregarded the sovereign immunity rule and allowed suit to be filed against the state, with or without its consent, *State ex rel Shell Oil Company v. Register of State Land Office,* 193 La. 883, 192 So. 519, and *Begnaud v. Grubb & Hawkins,* 209 La. 826, 25 So. 2d 606. The underlying theory of those cases in piercing the iron curtain of sovereign immunity was that the doctrine ". . .overlooks the fact that while the State possesses Legislative, public and governmental power in the exercise of which it is a sovereignty and governs its people, it also possesses proprietary and quasi private power conferred upon it not for the purpose of governing its people but for the private advantage of the inhabitants of the State itself as a legal personality. This distinction in the powers of the State was pointed out in the case of *State ex rel Shell Oil Company v. Register of State Land Office,* 193 La. 883, 192 So. 519. In that case this court held that when the state executed a mineral lease it was acting in its *proprietary or quasi private capacity and that having accepted the benefits under lease it could not escape its obligations—among which was the obligation of warranty.*" *Begnaud v. Grubb Hawkins,* supra, at Page 833 of 209 La. and at Page 608 of 25 So. 2d.

This court finds that *Shell* expresses a correct statement of Louisiana law and that *Cobb v. Louisiana Board of Institutions,*

further into this problem in lieu of Walmsley, which has been discussed and is accepted by this Court as the living law.

Plaintiffs further contend that defendant, Humble Oil & Refining Company, intervened in the state court proceedings in October of 1959, and has undertaken no action in that suit from then until now which would bring about an adjudication of the "title question." This allegation is without merit. Louisiana Code of Practice, Article 1094, provides that "[a]n intervenor cannot object to the form of the action, to the venue, or to any defects and informalities personal to the original parties."[15]

Plaintiffs' last contention is that a judgment of this Court ordering the payment of these past due

---

(at Page 13), (supra), does not overrule but seeks to distinguish the *Shell* case.

In *Cobb,* the Louisiana Supreme Court seemed to re-establish the doctrine of total immunity from suit without consent. However, in an excellent dissent, in *Cobb,* Justice Moise of the Supreme Court of Louisiana asserts that the *Cobb* opinion was based on the law of medieval England "that the King can do no wrong." Only four members of the *Cobb* court as then constituted are still sitting and whether the distinguished new members thereof would still adhere to the medieval law of England remains to be seen. The *Begnaud* case, supra is manifestly contrary to all other jurisprudence on the subject and cannot be perpetuated.

[15] The Official Revision Comments following this article indicate that it is a codification of the jurisprudential rule that an intervenor takes the proceedings as he finds them, *Cahn v. Ford,* 42 La. Ann. 965, 8 So. 477; *Parish v. Holland,* 166 La. 24; 116 La. 24; 116 So. 580; he cannot retard the progress of the main action, *General Motors Acceptance Corporation v. Jordan,* 65 So. 2d 627; cannot urge defenses personal to the defendant; *Devant v. Pecou,* 13 La. App. 594, 128 So. 700, *Chandler v. Burkhalter,* 10 La. App. 575, 121 So. 353; cannot urge matters that would go to dismissal of the suit; *Seib v. Cooper,* 170 La. 105, 127 So. 380; and, his rights are only limited to the protection of his own interests, *Parish v. Holland,* supra.

royalties to plaintiffs affords absolute protection to the mineral lessee against dual payment, citing *State ex rel Muslow v. Louisiana Oil Refining Corporation*, 176 So. 686, affirmed, *Arkansas Fuel Oil Company v. La. ex rel Muslow*, 304 U. S. 197, and *State ex rel Beal v. Caddo Crude Oil Purchasing Company*, 189 So. 333, for the proposition that:

> "Respondent, as stakeholder, should be concerned only with protecting itself against the danger of being exposed to double liability for the price of oil. When made secure against such a contingency, its anxiety should be allayed. Payments to relators under a decree of court will shield it completely against the evil day of double payments."

This contention is without merit. All of the cases cited by plaintiffs deal with private parties involved in matters litiguous over private lands. None of the cases involved water bottoms which may, or may not be owned by the State.[16]

Thus, the Court must end *Cutrer III* with basically the same paragraph and conclusion as expressed in *Cutrer II*, that is, the Court will retain jurisdiction of the case for reconsideration should anything prevent a prompt adjudication of the title question by the state tribunals, or until such time as the plaintiffs' title is quieted or defeated.

SO ORDERED.

.....

UNITED STATES DISTRICT JUDGE

April 20, 1964
New Orleans, Louisiana

---

[16] See Footnote 2, supra, setting forth the tests of LSA RS 30:105, 106 and 108.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21626

MRS. LILLIAN C. STEVENS, Testamentary Executrix of the Succession of Dr. Noah S. Cutrer and NICHOLAS D. OLIVIER,

Appellants,

versus

HUMBLE OIL & REFINING COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(May 27, 1965.)

Before WISDOM and GEWIN, Circuit Judges, and BOOTLE, District Judge.

WISDOM, Circuit Judge: For a long time this case, like other creatures spawned by Louisiana's water bottoms, has crawled sideways and backwards. Seven years ago Dr. Noah S. Cutrer, testator of Mrs. Lillian C. Stevens, and Nicholas D. Olivier began this action for cancellation of a mineral lease for nonpayment of royalties allegedly due. More than three years ago the court below ordered the defendant lessee, Humble Oil & Refining Company, to pay the disputed royalties into an escrow fund, pending the outcome of a suit brought by the plaintiffs in a

Louisiana state court, *in 1958*, over the same tract of land as is claimed here. About two years ago, having made no discernible progress in state court, the plaintiffs moved for distribution of the deposited royalties. The court denied the motion. We affirm. We understand the plaintiffs' impatience, but we agree with the district court's conclusion that the plaintiffs have not sustained the burden imposed on them by the decree establishing the escrow fund.

I.

December 19, 1953, plaintiff Stevens's testator, Noah S. Cutrer, gave Humble Oil & Refining Company a mineral lease covering some 1920 acres, in and around Stone Island in the West Black Bay Field in Plaquemines Parish, Louisiana. Almost all of the property is under water. As Judge Wright pointed out in his opinion establishing the escrow: "that is the source of the difficulty. For there is a serious question concerning the plaintiffs' title to the minerals in the water bottoms, which would normally belong to the state."[1] *Cutrer v. Humble Oil and Refining Co.*, 202 F. Supp. 569, 570. The State of Louisiana had previously issued a conflicting lease, State Lease No. 195, dated February 28, 1928, covering a large tract of land and water bottoms including

[1] La. Act 727 of 1954. LSA-R.S. 9:1107, declares that: "It has been the public policy of the State of Louisiana at all times since its admission into the Union that all navigable waters and the beds of same within its boundaries are common or public things and insusceptible of private ownership * * *." See also, LSA-Const. 1921, Art. 4, § 2; La. Acts 106 of 1886, 110 of 1892, 121 of 1896, 153 of 1902, 52 of 1904, 189 of 1910, 54 of 1914, 139 of 1924, 258 of 1926, and 67 of 1932, insofar as here pertinent, now incorporated in LSA-R.S. 56:421; La. Act. 258 of 1910, now LSA-R.S. 9:1101; Comment 30 Tulane L. Rev. 115.

most of the parcel the plaintiffs purportedly leased to Humble. This lease is now owned by Gulf Oil Corporation and the Estate of William Helis. Gulf has drilled producing wells on the lease; Gulf and Helis have paid royalties to the State.

For almost all of the five-year primary term of its lease from the plaintiffs, Humble paid delay rentals but did no drilling, allegedly because of its concern over the State's adverse claim to the leased premises. Then, late in 1958, its lease about to expire, Humble entered into a joint operating agreement with the State's lessees for the development of Stone Island and the immediately surrounding water bottoms, an area of about 250 acres (the "joint area").[2] The agreement designated Gulf as operator. December 18, 1958, one day before the expiration of the primary term, Gulf completed a well on the eastern half of Stone Island.

Meanwhile, November 13, 1958, before the first well had been completed, plaintiffs filed an ejectment suit in a Louisiana court[3] to evict Gulf from this acreage and other portions of the lease in suit, including the joint area. Gulf answered that as to the water bottoms, it asserted a right to possession of the disputed property under State Lease No. 195 and by authority of the Louisiana Conservation Commission. Humble

[2] "Humble's participation in the portion of this 'joint area' within the lease, about 250 acres, was calculated on the basis of the land area only, some 57 acres, on the ground that the water bottoms were excluded from the plaintiffs' lease and were covered by the state lease." Cutrer v. Humble Oil & Refining Company, E.D. La. 1962, 202 F. Supp. 568 at 570.

[3] Noah Cutrer and Nicholas D. Olivier v. Gulf Oil Corporation, Civil District Court for the Parish of Orleans, Louisiana, No. 366-650, filed November 13, 1958.

then intervened in the state action, and, on September 22, 1959, Gulf filed a supplemental answer, justifying its presence not only under the State lease, but also by virtue of the joint operating agreement with Humble, plaintiffs' own lessee. This suit has never been moved to trial; it is still pending in state court.

March 9, 1959, several months after filing the action against Gulf, Cutrer and Olivier brought the present suit against Humble in the United States District Court for the Eastern District of Louisiana. In their complaint plaintiffs alleged that oil had been produced on the premises leased to Humble, both during the primary term of the lease and afterwards, and that Humble had paid no royalties to the plaintiffs. They demanded cancellation of the lease and an accounting for all minerals taken. Alternatively, in the event that the lease, in whole or in part, was not cancelled, plaintiffs asked an accounting for all minerals taken from those areas where the lease was still in effect. April 3, 1961, the district court rendered an opinion limited solely to the question of cancellation for nonpayment of royalties. The court decided that, though the plaintiffs were "probably right", Humble's position—that it was entitled to withhold the royalties because of the presence of an adverse claim by the State—was "at worst, erroneous", and that there was no proof that Humble was in bad faith. The court therefore declined to apply "the harsh sanction of cancellation". The question whether royalties attributable to the water bottoms were actually due was left open. *Cutrer v. Humble Oil & Refining Company,* E.D. La. 1961, 192 F. Supp. 757, 758.

In a later opinion, dated March 30, 1962, the court considered the question of whether the royalties claimed by plaintiffs were in fact due. *Cutrer v. Humble Oil & Refining Co.*, E.D. La. 1962, 202 F. Supp. 568, aff'd 309 F. 2d 752, *cert. den'd* 372 U.S. 936. That opinion dealt separately with various parts of the leasehold; the only part involved here, however, is that including *the water bottoms lying within the joint area.*[4] The court noted that since Gulf, under the joint operating agreement, was developing the joint area on behalf of Humble, Humble could not label Gulf's possession adverse. On the other hand, the court also recognized that, because of the very real possibility that the leased water bottoms belonged to the State, Humble would undergo a substantial risk of double exposure if forced to pay plaintiffs the royalties claimed due. The court was reluctant, therefore, to order payment, especially because of its view that the state proceedings pending between plaintiffs and Gulf might "soon resolve the basic title question". In order to avoid subjecting Humble to the risk of paying twice, and at the same time to protect the rights of the plaintiffs, the court devised the following solution:

> [A]s soon as an escrow plan can be established, Humble will deliver all accrued royalties attributable to the joint area water bottoms within the lease, and will henceforth pay into that fund

[4] With regard to the other portions in dispute, the court (1) held that Humble had, in effect, abandoned those portions of the leasehold outside the joint area already developed by Gulf; and (2) gave Humble ninety days to start developing those portions outside the joint area that no one had developed. Humble does not question the plaintiffs' title to the landed portions within the joint area.

all such royalties, at least quarterly, until such time as the plaintiffs' title is quieted or defeated, or until the further orders of the court. The court will retain jurisdiction of the case for reconsideration should anything prevent a prompt adjudication of the title question by the state tribunals. 202 F. Supp. at 574.

The 1962 escrow fund is the stuff of this appeal. April 30, 1963, plaintiffs moved to have the escrow agent pay out the deposited royalties. The district court below denied the motion on the ground that plaintiffs, despite their continuing opportunity to get a "prompt adjudication of the title question by the state tribunals", had simply failed to do so. *Cutrer v. Humble Oil & Refining Company*, E.D. La. 1964, 228 F. Supp. 787.

II.

The plaintiffs' argument reduces to two propositions: (A) that Humble would be adequately protected against double payment should the district court order distribution of the escrow fund, and (B) that plaintiffs have been prevented from getting a "prompt adjudication of the title question" in state court.

A. The district court fully disposed of the first of these contentions in 1962, when it set up the escrow fund. This Court affirmed that disposition on appeal. 309 F. 2d 752.

The plaintiffs do not argue that Humble's risk of double payment has decreased since 1962; nor do

they raise any argument not already considered and rejected, here and below.[5] The only novel aspect of the plaintiffs' presentation is their reliance on *Arkansas Fuel Oil Company v. Louisiana ex rel Muslow*, 1938, 304 U. S. 197, 58 S. Ct. 832, 82 L. Ed. 1287. But that case provides small comfort to the plaintiffs. The Arkansas Fuel Oil Company asked the Supreme Court to hold unconstitutional, Act 64 of 1934 (now La. R.S. 30:105 et seq.). This Act provides that a mineral lessee may not withhold royalties from a lessor with record title unless a suit testing the lessor's title has been filed in the parish where the leasehold is located; and that a lessee who does pay royalties to his lessor as required by the statute will be protected against double payment. The Court concluded that in the circumstances of the case payment would deprive the Company of no constitutional rights. The Court therefore did not pass on either the applicability or the constitutionality of the statute. Act 24 of the first Extra Session of 1935 (now La. R.S. 30:108) amended Act 64 of 1934 to exclude "minerals produced from lands belonging to the state". The effect of this amendment was also not considered by the Court in *Muslow*. It is clear that the Supreme Court recognized the state law. All that the state courts decided was that there was no evidence of any claim by the State; the Court did not

---

[5] Plaintiffs urge that California Company v. Price, 1954, 225 La. 706, 74 So. 2d 1, upholding the validity of a state patent to navigable water bottoms over a state lessee's objection that navigable water bottoms are insusceptible of private ownership, establishes the validity of plaintiffs' claim to the water bottoms here in suit. But the district court found that, in addition to the insusceptibility problem, however real, there is a substantial ambiguity in plaintiffs' title description. 202 F. Supp. at 574, esp. n. 32.

reach the issue the plaintiffs rely on in the instant case.

B. The plaintiffs' second contention, necessarily not considered in any earlier phase of this suit, is more troublesome. This is the contention that they have been prevented from getting a prompt adjudication of the title question in the state court. The plaintiffs charge that Gulf, Humble, and the State of Louisiana are conspiring to keep the title question from ever being decided. The plaintiffs take the position that they can settle title only in an action to which the State is a party. They point out that Gulf could call the State in warranty in the ejectment action, but instead defends its presence on the leasehold by authority of Humble, plaintiffs' own lessee; and that sovereign immunity protects the State from suit anyway. Therefore, say the plaintiffs, not only would they lose the ejectment action should they ever move it to trial, but even if they won they would not get an adjudication of title.

We disagree with the plaintiffs' basic assumption that title can be settled against the State only. The district court, author of the escrow arrangement, spelled out precisely what the plaintiffs should do in order to get distribution of the escrow fund: they may either amend their petition or file a supplemental petition in the state action, styling that action one to quiet, or to remove a cloud from, title, and joining the State Mineral Board;[6] or they may

[6] The Mineral Board, leasing agent for the State, may be sued without its consent. La. Rev. Stat. 30:121. See also Walmsley v. Pan American Petroleum Corporation, 1963, 244 La. 513, 153 So. 2d 375; Daigle v. Pan American Production Company, 1958, 236 La. 578, 108 So. 2d 516; Texas Co. v. State Mineral Board, 1949, 216 La. 742, 44 So. 2d 841.

bring an entirely new state action against both Gulf and the Mineral Board. The relief sought would be cancellation of State Lease No. 195 insofar as it purports to cover land the plaintiffs claim.

Recent Louisiana decisions leave no doubt that an action to quiet title, brought to cancel a State mineral lease, will lie against the Mineral Board and the State's lessee even though the State itself is not made a party. *Walmsley v. Pan American Petroleum Corporation*, 1963, 244 La. 513, 153 So. 2d 375; *Daigle v. Pan American Production Company*, 1958, 236 La. 578, 108 So. 2d 516. In *Daigle* the Louisiana Supreme Court described the action to quiet title:

> The action to quiet title is clearly one to remove a cloud therefrom. It is neither petitory nor possessory, nor is it one in jactitation nor one to try title under Act 38 of 1908 (LSA-R.S. 13:5062). Having no codal or statutory background, it is an innovation of our jurisprudence. In an action to remove a cloud . . . possession is not necessary in either plaintiff or defendant. A plaintiff may sue for the cancellation of a recorded deed, mineral lease or other recorded instrument which allegedly operates as a cloud on his title, and *the issue of title may be determined as incidental to plaintiff's right to have the alleged cloud removed.* 108 So. 2d at 518. (Emphasis added.)

The plaintiffs have declined to follow the district court's suggestion, and allowed the state action to lie fallow during the pendency of this appeal. They say that they have done so because of their belief that

only a suit against the State itself could produce an "adjudication of title" that would satisfy the terms of the escrow decree. They point out quite rightly that they can get a declaration of title only by bringing a petitory action, and that the State would be an indispensable party to such an action against a State lessee.[7] But the decree of the district court, as we read it *and as the district court itself reads it*, does not require a declaration of plaintiffs' title by the state court as a condition precedent to distribution of the escrow fund; the decree speaks only of an *"adjudication"* of title. In *Walmsley* and *Daigle* the Louisiana Supreme Court has made it clear that there can be an adjudication of title incidental to cancellation of a state mineral lease, whether or not the State is joined. Indeed, the very terms of the decree, ordering Humble to pay the disputed royalties into the escrow fund "until such time as plaintiffs' title is *quieted* or defeated" (Emphasis added), suggest resort to an action to quiet title.

In short, the district court has not required plaintiffs to do the impossible, or even the unreasonable.

---

[7] Art. 3651, La. Code of Civil Procedure, provides:

> The petitory action is one brought by a person who claims the ownership, but who is not in possession, of immovable property or of a real right, against another who is in possession or who claims the ownership thereof adversely, to obtain judgment recognizing the plaintiff's ownership.

Official Revision Comment (b) under Art. 3651 says that the petitory action "must be brought directly against the adverse claimant of ownership, or if there is no adverse claim, against the person in possession". In a petitory action brought against an adverse lessee, the adverse lessor is an indispensable party. Kuchenig v. California Company, 5 Cir. 1965, F.2d ; Daigle v. Pan American Production Company, supra.

It has simply said: We prefer not to order payment of the deposited royalties while parts of the disputed water bottoms are covered by an adverse state lease now under attack by plaintiffs in state court. However, should the Louisiana court be so unimpressed with the State's title claim as to cancel the state lease, we would feel safe in ordering Humble to pay its lessors. Plaintiffs, the moving party both here and in the state court, should bear the burden of quieting their own title.

The judgment of the district court is AFFIRMED.

APPENDIX B.

LOUISIANA STATUTORY LAW.

Act 64 Louisiana Legislature of 1934:

LSA-RS 30:105 et seq.: "It shall be unlawful for a person acquiring mineral rights from, or mineral rights under a lease by, the last record owner and holding under an instrument sufficient in terms to transfer title or for a person purchasing mineral products to withhold payment of any rentals, royalties or other sums due to a party holding an interest in the minerals, or under the lease."

"A person producing minerals under a lease granted by the last record owner and holding under an instrument sufficient in terms to transfer title to the land or mineral rights, shall be presumed to have derived his right from the true owner. The lessor, royalty owner, lessee or producer or persons holding from them shall be entitled to all minerals produced or to their proceeds, unless and until a suit testing title of the land or mineral rights embraced in the lease is filed in the district court of the parish in which the property is located."

Act 24 Louisiana Legislature of 1935:

LSA-RS 30:108: "RS 30:105-30:106 shall not apply to minerals produced from lands belonging to the State."

Article 3, Section 35, Louisiana Constitution of 1921:

"Whenever the Legislature shall authorize suit to be filed against the State it shall provide the method for citing the State therein and shall designate the court or courts in which the suit or suits authorized may be instituted and may waive any prescription which may have accrued in favor of the State against the claim or claims on which suit is so authorized. The procedure in such suits, except as regards citation and original jurisdiction, shall be the same as in suits between private litigants, but no judgment for money rendered against the State shall be satisfied except out of monies appropriated by the Legislature for the purpose. For the purpose of such suits the State shall be considered as being domiciled in the Capitol. No such suit shall be instituted in any court other than a Court of Louisiana. Except as otherwise specially provided in this section, the effect of any authorization by the Legislature for a suit against the State shall be nothing more than a waiver of the State's immunity from suit insofar as the suit so authorized is concerned."